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No. 98-1291

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In The

Supreme Court of the United States

October Term, 1998

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Petitioners,

v.

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER,

Respondents.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY

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PETITIONERS' REPLY

The brief in opposition filed by the respondent Commissioners of the New Hampshire Public Utilities Commission ("NHPUC") principally relies upon the fact that the Federal Energy Regulatory Commission ("FERC") did not affirmatively "dictate" the allocation of wholesale power and costs between petitioners Central Vermont Public Service Corporation ("CVPS") and Connecticut Valley Electric Company ("CVEC"). (Br. Opp. 8-9) Instead, FERC accepted the RS-2 Rate Schedule for filing "as just and reasonable" without objection. But *Mississippi Power & Light Co.*[1] expressly holds that the preemptive effect of a filed rate does not depend on whether (i) FERC affirmatively mandates or (ii) merely accepts the contracting parties' allocation agreement. The distinction drawn by the NHPUC and FERC to persuade the First Circuit to vacate the District Court's preliminary injunction violates both the federal policy and the logic of this Court's filed-rate case law.

1. This Court's Holding in *Mississippi Power & Light* Should Not Be Limited to Its Facts, Nor Should *Montana-Dakota Utilities* Be Overruled.

The FERC/NHPUC distinction between an affirmative FERC order allocating power between affiliates of an integrated interstate power system and a FERC order that accepts the contracting parties' uncontested allocation would restrict this Court's holding in *Mississippi Power &*

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[1] *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

Light to its facts and overrule *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951). This Court should instead hold that the filed-rate doctrine as enunciated in *Mississippi Power & Light* applies in full force whenever FERC accepts the contracting parties' uncontested allocation agreement.

The fundamental holding of *Mississippi Power & Light* is that the allocation of power and its attendant cost between affiliates of an integrated interstate power system is solely within FERC's province and beyond prudence review by State commissions. The policy behind that holding is clear: State prudence review of such interstate allocations would lead to a balkanized wholesale power system in which one State seeks to shift unwanted power costs to affiliates operating in other States, the other affected States retaliate, and the interstate system is confronted with the dilemma of complying with inconsistent State obligations. *Mississippi Power & Light* preempted the issue by confirming that FERC has exclusive jurisdiction over such interstate power allocations.

The First Circuit in this case accepted the NHPUC's and FERC's argument that *Mississippi Power & Light* should extend only to cases in which FERC has affirmatively mandated a particular allocation between interstate affiliates. In that case, FERC had disagreed with the affiliates' allocation agreement and instead ordered that the system's power and costs be allocated on the basis of the affiliates' proportionate peak demands for power. Nowhere in *Mississippi Power & Light* did this Court indicate that its holding was dependant on the fact that FERC had mandated a reallocation. Here, the RS-2 Rate Schedule adopts precisely the same allocation as FERC required

in *Mississippi Power & Light* based on CVEC's and CVPS's proportionate peak demands, 487 U.S. at 362-364, and that agreement, never challenged at FERC by the NHPUC or any other interested party, was accepted as "just and reasonable" by FERC without any reallocation. Neither the NHPUC nor FERC suggests any reason why the outcome should be different here or why State commissions under these facts should be able to undertake the prudence review barred by *Mississippi Power & Light* and shift unwanted power costs to other States.

But the First Circuit's error goes well beyond violating federal policy and logic. *Mississippi Power & Light* followed this Court's original filed-rate decision in *Montana-Dakota Utilities*, which held that a filed rate preempts State jurisdiction both when the rate is affirmatively fixed by FERC and also when the rate is "merely accepted by the Commission." 341 U.S. at 251-252. This Court in *Mississippi Power & Light reversed* the Mississippi Supreme Court's decision that State prudence review of the allocation of power to an affiliate of an interstate system was permissible as long as FERC had not affirmatively decided that the allocation was prudent:

> The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings. . . . We have long rejected this sort of "case-by-case analysis of the impact of state regulation upon the national interest" in power regulation cases. . . . Congress has drawn a bright line between state and federal authority

> in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. 487 U.S. at 374 (citations omitted).

The result of the First Circuit's decision is to create substantial doubt concerning the application of the filed-rate doctrine to an uncontested interstate system allocation agreement just as restructuring initiatives in many States are disrupting long-established power supply and allocation arrangements.

2. The First Circuit's Decision Permits the State Commission to Undertake a Prudence Review of an Interstate Power System's Allocation Agreement, Precisely the Issue this Court Granted *Certiorari* to Decide in *NOPSI IV*.

The First Circuit's failure to uphold the filed-rate doctrine under the facts of this case enables a State commission to decide the prudence of a power allocation agreement between affiliates of an interstate system. Not surprisingly, New Hampshire's decision that the allocation is imprudent shifts costs either to the ratepayers in another State, Vermont, or to the shareholders of the interstate system. Therefore, this cost-shifting will adversely affect CVPS's capability to provide service to Vermont consumers. Moreover, New Hampshire's parochial action threatens to destroy the interstate system itself, without any action by FERC.

This same issue was raised in *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("*NOPSI IV*"), 911 F.2d 993 (5th Cir. 1990), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991), and this Court was poised to decide

it. The case was settled before decision, however, and thus the issue remains unresolved.

The NHPUC relegates *NOPSI IV* to a footnote (Br. Opp. 9 n.7) and attempts to distinguish it by denying that there is a similar power allocation agreement here. But the NHPUC's contention is a *non sequitur*. It argues that because the RS-2 Rate Schedule calculates CVEC's costs on the basis of overall system costs, not through a separate CVEC unit cost, and the amount that CVEC pays is therefore determined by its usage, RS-2 cannot be considered an allocation agreement. *Id.* at 8. Nowhere does the NHPUC explain why the method used in the RS-2 Rate Schedule to calculate CVEC's costs precludes it from being an interstate allocation agreement. To the contrary, as the NHPUC admits, that CVEC's power costs under RS-2 is based upon "CVEC's proportional usage of those [interstate system] facilities." *Id.* An allocation method that determines an affiliate's share of systemwide cost based upon its proportionate usage – the method used in RS-2 – is exactly what FERC required in *Mississippi Power & Light*.

The NHPUC also argues that "on two separate occasions FERC has ruled that the RS-2 Rate Schedule cannot be said to contain an interstate allocation agreement." (Br. Opp. at 8, *citing Central Vermont Pub. Serv. Corp.*, 81 F.E.R.C. (CCH) ¶ 61,336 at 62,542-3, *rehearing denied*, 84 F.E.R.C. (CCH) ¶ 61,295 at 62,371 (1998).) In fact, FERC did not decide whether the RS-2 Rate Schedule was an allocation agreement, but instead held that the fact that it had not "dictated" the power allocation contained in the Schedule made *Mississippi Power & Light* inapplicable, thereby violating the holding of *Montana-Dakota Utilities*

that the filed-rate doctrine applies in full force even where FERC has merely accepted an uncontested filing and has not had to order a modification of the filing.

Just as in *NOPSI IV*, the State commission here attempts to evade the filed-rate doctrine by disguising its action as "ordinary, state prudence-review ratemaking." Just as clearly as in *NOPSI IV*, the State commission in fact is invading the exclusive federal domain of interstate power regulation. What is different here is that FERC, which strenuously fought against State intrusion in *NOPSI IV*, is facilitating that encroachment and attempting a substantial expansion of State authority over interstate transactions through a narrowing of the filed-rate doctrine. Such a fundamental change in the dividing line between federal and State jurisdiction over interstate power transactions, resulting in a shift in authority at odds with the policy that led to this Court's holding in *Mississippi Power & Light*, should not be permitted without full review by this Court.

3. Any Prudence Review Should Have Been Conducted by FERC.

The NHPUC premises its assertion of jurisdiction to review the prudence of CVEC's decision not to terminate the RS-2 Rate Schedule on the termination clause of that Schedule's evergreen provision. The NHPUC treats the termination issue as one between independent, arm's-length firms in which a mere comparison between the contractual price and available prices from other suppliers determines whether termination is prudent. The NHPUC ignores the fact that CVEC was incorporated

solely to enable CVPS to continue to supply retail power in New Hampshire. CVEC has no employees of its own; it is entirely controlled by CVPS. Under these circumstances, termination of the RS-2 Rate Schedule will cause the termination of the entire interstate system. The decision whether an integrated interstate power system should be terminated is a matter within FERC's exclusive jurisdiction over interstate power transactions. Compelling such termination is in no sense "ordinary ratemaking" by a State commission. Therefore, however the termination clause of the RS-2 Rate Schedule is construed,[2] it does not provide the NHPUC with jurisdiction to determine whether the CVPS/CVEC system should be terminated or, if so, what the terms of any termination must be.

FERC has never expressly ruled on the prudence of CVEC's decision not to terminate the RS-2 Rate Schedule because no one has asked it to review the matter, not for lack of jurisdiction. As this Court stated in *Mississippi Power & Light*, "[t]he question of prudence was not discussed, however, because no party raised the issue, not

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[2] In the underlying litigation from which this Petition arises, the parties dispute whether the termination clause permits CVEC to terminate the RS-2 Rate Schedule unconditionally even though CVPS has made long-term commitments to obtain the power needed for CVEC's New Hampshire customers or instead whether such termination would require compensating CVPS for its stranded costs. That disputed issue does not affect the filed-rate issue raised by the Petition because, however the termination clause is interpreted, the NHPUC does not have authority to determine whether it is prudent to terminate the CVPS/CVEC system, which instead is a matter within FERC's exclusive jurisdiction.

because it was a matter beyond the scope of FERC's jurisdiction." 487 U.S. at 375.

Rather than allow the NHPUC, FERC, and the First Circuit to abridge the filed-rate doctrine as it applies to interstate power systems and limit *Mississippi Power & Light* to its facts, this Court should grant *certiorari* to restrict the so-called *Pike County*[3] exception to the filed-rate doctrine to circumstances not impinging on exclusive federal jurisdiction and policy over interstate power transactions.[4]

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[3] *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983).

[4] The cases cited by the NHPUC as supporting its assertion of jurisdiction dealt with very different circumstances.

In *Gulf States Utilities Co. v. Public Util. Comm'n*, 841 S.W.2d 459, 468 (Tex. App. 1992), the court specifically found that, unlike CVEC here, "Gulf States is not a participant in an integrated pooling arrangement which might invoke FERC's exclusive jurisdiction."

The Third Circuit in *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 610-611 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988), found *as a factual matter* that the plaintiff had failed to prove that the State commission's rate order disallowed costs required to be paid as a guarantee for a long-term supply of gas under the FERC-approved contract and therefore did not violate the filed-rate doctrine.

Finally, the New Hampshire Supreme Court's decision in *Appeal of Sinclair Machine Products, Inc.*, 498 A.2d 696 (1985), took an unduly narrow view of the filed-rate doctrine. The Mississippi Supreme Court relied upon *Sinclair* in *State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n*, 506 So.2d 978, 986 (Miss. 1987), and was in turn reversed by this Court, 487 U.S. at 374, which reaffirmed that FERC's exclusive jurisdiction is not limited to matters it expressly decides.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the petitioners ask the Court to issue a writ of *certiorari* and reverse the First Circuit's decision.

Respectfully submitted,

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